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PP

v.

AMRUL LUBIS

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HIGH COURT MALAYA, JOHOR BHARU
JEFFREY TAN J
[CRIMINAL TRIAL NO: 45-60-2004]
13 AUGUST 2008

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CRIMINAL LAW: *Dangerous Drugs Act 1952 - Section 39B(1)(a) - Trafficking in methamphetamine - Whether there was conclusive proof to link accused to drugs - Recovery of proscribed drug in the absence of accused - Whether accused would be effectively denied the chance to challenge the very evidence upon which his fate hangs - Weight of proscribed drugs - Whether could be ascertained from evidence given - Whether weight of proscribed drugs could be rightly stated in amended charge - Failure to prove physical possession - Failure of prosecution to prove each and every ingredient of offence - Whether accused to be acquitted and discharged - Dangerous Drugs Act 1952 ss. 37(da), 39B(1)(a) - Criminal Procedure Code, s. 180(1), (4)*

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The accused was tried for the offence of trafficking in 208.14 grammes of methamphetamine under s. 39B(1)(a) Dangerous Drugs Act 1952 punishable under s. 39B(2) of the same Act. Briefly, the facts were that at 12.30pm on 16 September 2003, the accused was at the customs check point at the Stulang Duty Free Complex, Johor Bahru. The prosecution witness, SP2, noticed a suspicious bulge on the trousers zip area of the accused. SP2 escorted the accused to the customs examination room for further examination. In the examination room, SP2 ordered the accused to stand in front of the table, to empty his pockets and to place its contents on that table. The accused complied and stood in front of the table. Thereafter, SP2 walked out of the room and closed the door. Whilst in front of the door, SP2 heard banging sounds from the wooden cabinet in the examination room and straightaway opened the door. According to SP2, the accused had changed his position from being in front of the table to being in front of the wooden cabinet, and that from where SP2 stood at the door he saw two black packages on the floor beneath the table. A traveler control officer, one Saadon, arrived at the scene and entered the examination room where he enquired about those two packets from the accused. The accused denied all knowledge of those packets. Saadon then directed the accused to pick up those two black packets beneath the table. The accused complied. Saadon then arrested the accused with the two black packets in his handcuffed hands and brought him to the travelers control room. The

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accused was detained at the travelers control room with the two black plastic bags embossed 'Kolok' placed on a table. SP2 then remembered the sounds he heard from the wooden cabinet and proceeded with a senior customs officer, SP6 to the examination room to search the wooden cabinet where they uncovered a third black packet which was also embossed 'Kolok.' At the travelers control room, SP2 placed that third black packet next to the other two packets on the table and found that they were the same. It was the unchallenged testimony of the government chemist (SP3) that the first plastic packet 'X1'contained 66.48 grams of methamphetamine, the second plastic packet marked 'X2' contained 69.54 grams of methamphetamine and the third plastic packet marked 'X3' contained 72.12 grams of methamphetamine.

At the close of the prosecution case, counsel for the accused submitted that (1) there was no conclusive proof to link the accused to the drugs; (2) SP2 left the examination room without seeing the accused emptying his pockets so it was not proved that the packets came from the accused;(3) none of the witnesses could say which packets were recovered from the floor beneath the table or which packet was recovered from the wooden cabinet; (4) as the third packet was not recovered in the presence of the accused, defence could not be called for all three packets and as it was not proved which two were those packets, defence could not be called for the two packets on the floor; (5) since physical possession was not proved, there could not be any question of trafficking. The learned Deputy Public Prosecutor (DPP) nevertheless contended that all three packets must have come from the accused and pointed to the evidence that the accused was 'terkejut dan gelisah' when SP2 examined the suspicious bulge, that the packets were not there before the accused was brought into the examination room and that the similarity in appearance, weight, size and wrappings of all three packets was no coincidence.

Held (acquitting and discharging the accused):

(1) The importance of an accused being present to witness the recovery of proscribed drugs is that an accused who is not present during the recovery of the proscribed drugs would be effectively denied the chance to challenge the very evidence upon which his fate hangs, and would be thus seriously handicapped in the conduct of his defence. That could not be fair. If proscribed drugs, *albeit* recovered without the presence of the accused, could be admitted in evidence, then there could be no safeguard against the possibility of proscribed drugs being planted after the arrest. That would throw open the possibility of unjust convictions. The greater issue was the safeguard or some safeguard against false evidence which would be breached if the third packet were allowed to incriminate the accused. Simply put, the third packet could not be in the equation. (para 11)

(2) SP2 and SP6 had not made any individual marks on any one of the three packets, or identified the packets that were recovered from the floor or from the wooden cabinet. That presented a most serious problem. The weight of the proscribed drugs must be stated in the amended charge, if the accused were to be called to enter upon his defence. But that weight could not be ascertained from the evidence. It was granted that the weight of those two packets must be the combined weight of two of those three packets, in any combination of two, would exceed the minimum tariff attracting the presumption under s. 37(da). But that deduction would still leave unresolved the precise weight of those two packets. The weight of the proscribed drugs just could not be stated in the (amended) charge. There was yet the more crucial but unresolved issue of the identity of those two packets recovered from the floor. There was no way of knowing which two packets, X1, X2 and X3, should the proscribed drugs and the incriminating evidence, in the event that the accused were to be called to enter upon his defence. In the face of those uncertainties, and bearing in mind that it was the duty of the prosecution to prove each and every ingredient of the offence, it surely would not seem just or right to call the accused to enter upon his defence. There was really no other alternative but to acquit and discharge the accused. (para 12)

Case(s) referred to:

Balachandran v. PP [2005] 1 CLJ 85 FC ***(refd)***

Choo Chang Teik & Anor v. PP [1991] 3 CLJ 2387; [1991] 1 CLJ (Rep) 54 SC ***(refd)***

Jayaraman Velayuthan & Ors v. PP [1982] CLJ 464; [1982] CLJ (Rep) 130 FC ***(refd)***

Pang Chee Meng v. PP [1992] 1 CLJ 39; [1992] 1 CLJ (Rep) 265 SC ***(refd)***

PP v. Abdul Manaf Muhamad Hassan [2006] 2 CLJ 129 FC ***(refd)***

PP v. Hanif Basree Abdul Rahman [2008] 4 CLJ 1 FC ***(refd)***

Tai Chai Keh v. PP [1948] 1 LNS 122 CA ***(refd)***

Legislation referred to:

Criminal Procedure Code, s. 180(1), (4)

Dangerous Drugs Act 1952, s. 37(da)

For the prosecution - Amirah Mohd Yusoff; DPP

For the accused - Navamani Arumugam; M/s Navamani & Co

Reported by Suhainah Wahiduddin

JUDGMENT

Jeffrey Tan J:

[1] The accused was tried for the following capital offence.

> Bahawa kamu pada 16.9.2003 lebih kurang jam 12.30 tengahari di laluan keluar Terminal Jeti Stulang Laut, dalam Negeri Johor Darul Ta'zim, telah mengedar dadah berbahaya iaitu Methamphetamine seberat 208.14 gram, dan dengan itu kamu telah melakukan satu kesalahan di bawah Seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 yang boleh dihukum di bawah seksyen 39B(2) Akta yang sama.

[2] 11 witnesses were summoned by the prosecution to prove the charge. It was the prosecution story that the accused, who was on his way to board the ferry to Batam, Indonesia, was searched at the customs check point, and that in the search that followed, two packets of the said dangerous drug were recovered in the presence of the accused while a 3rd packet of the same said dangerous drug was recovered in the absence of the accused. But it was not proved which two packets were allegedly recovered in the presence of the accused, and which one packet was allegedly recovered in the absence of the accused.

[3] The only prosecution witness who could give a complete account on the recovery of all three packets of drugs was SP2 (Mohd Fazli bin Mohamad), the customs officer on duty at the customs check point at the Stulang Duty Free Complex, Johor Bahru at the material time. The collective story of SP2 and other witnesses from the Royal Malaysian Customs could be summarised as follows.

[4] At 12.30pm on 16 September 2003, the accused was at the customs check point at the Stulang Duty Free Complex, Johor Bahru. The accused was on his way to board the ferry to Batam, Indonesia. Slung on the shoulder of the accused was a green canvass bag (P5). SP2 examined and found that bag to contain clothing, a telephone charger, a lighter and some loose change (RM14.20). SP2 noticed a suspicious bulge on the trousers zip area of the accused. Using his fingers, SP2 felt that there was something concealed underneath. According to SP2, "Saya rasa OKT rasa terkejut dan gelisah". SP2 escorted the accused to the customs examination room (examination room) that was immediately in front of the counter where he had examined the bag of the accused, for further examination. In the examination room, SP2 ordered the accused to stand in front of the table, to empty his pockets and to place its contents on that table. The accused complied and stood in front of the table. Thereafter, SP2 walked out of the room and closed the door. Whilst in front of the door, SP2

heard banging sounds from the wooden cabinet in the examination room. SP2 straightaway opened the door. According to SP2, the accused had changed his position from being in front of the table to being in front of the wooden cabinet, and that from where he stood at the door he saw two black packages on the floor beneath the table. SP2 asked the accused, as to what he had done. The accused remained silent. According to SP2, those two black packets were not there when he ordered the accused to empty his pockets. SP2 asked a crew of the ferry to summon a traveller control officer. About two minutes later, a Traveller Control Officer, Saadon Mohd. Nor, arrived at the scene. SP2 briefed Saadon (Saadon passed away on 18 July 2006 – see p. 15 of the notes of proceedings). SP2 and Saadon then entered the examination room. Saadon enquired about those two packets from the accused. The accused denied all knowledge of those packets. Saadon directed the accused to pick up those two black packets beneath the table. The accused complied. Saadon then arrested the accused. SP2 and Saadon escorted the accused with the two black packets in his handcuffed hands, to the Travellers Control Room, after SP2 had first locked up the examination room. Those two black packets were embossed "Kolok". At the Travellers Control Room, SP2 contacted SP6 (Mohd. Roslan bin Mokhtar – a Senior Customs Officer). Meantime, the accused was detained in the Travellers Control Room, with the two black packets placed on a table. About ten minutes later, SP6 and SP4 (Masron bin Sahari – a Senior Customs Officer) arrived at the Travellers Control Room. SP2 briefed SP6. SP2 then remembered the sounds he heard from the wooden cabinet. SP2 and SPG proceeded to the examination room, to search the wooden cabinet. Inside the wooden cabinet, SP2 and SP6 uncovered a 3rd black packet, also embossed "Kolok", on top of a pile of newspapers. The accused was not present when SP2 and SP6 uncovered that 3rd packet (see p. 18 of the notes of proceedings). SP6 instructed SP2 to bring that 3rd packet to the Travellers Control Room. About 5 or 6 minutes after they had left, SP2 and SP6 were back at the Travellers Control Room, with the 3rd black packet and the topmost sheet from the said pile of newspapers. At the Travellers Control Room, SP2 placed that 3rd black packet next to the other two packets on the table. According to SP2, all three packets were black in colour and embossed "Kolok", and according to SP6, all three black packets "adalah serupa". The customs officers present then stood guard over the accused, while they waited for the arrival of the Customs Drugs Unit. At 3pm, SP9 (Hafiz bin Haris), the head of the customs drugs unit, arrived at: the Travellers Control Room, whereat SP6 handed the accused, said three packets, and canvass bag to SP9. Later, at the customs office, SP9 handed the accused and all exhibits to the investigation officer (SP10 – Khairulanuar bin Ishak).

[5] Up to that point, there was yet no evidence that any one witness had marked the exhibits. Indeed, it was the testimony of both SP9 (see pp. 44-45 of the NP) and SP10 (see pp. 50-52) that the exhibits were only marked after they had been handed to SP10. As a matter of fact, the effect of the testimony of SP10 was that all exhibits were bereft of all markings when he received them. Pertinently, SP10 even revealed that: the myriad markings on the drug exhibits were not made by either SP2 and or SP6 who had allegedly recovered them.

[6] The full testimony of SP10 was as follows. At 3.25pm on 16 September 2003, at the Johor Bahru Customs Investigation Office, he met SP9 who handed to him the accused and his passport, a green canvass bag, and three black packets embossed "Kolok". Two customs officers (SP5 and Seng Yean a/l Tian) examined the canvass bag and recorded its contents. He affixed a (rectangular piece of) masking tape onto the carbon paper of each packet. Then, on his instruction, SP2, SP5 and SP9 affixed their signatures on that masking tape on the carbon paper of the 1st packet. He removed the carbon paper of that packet and uncovered a clear plastic packet containing a powdery substance. He made the markings ("X1", investigation number, and date 16 September 2003) on the first clear plastic packet. SP2 and SP9 also affixed their signatures onto that clear plastic packet. He weighed and found that the gross weight of "X1" was 101.8 grams. He repeated that same process to the 2nd and 3rd black packets. He, SP2 and SP9 put their signatures on the masking tape on the carbon paper of the 2nd packet. He removed that carbon paper of that 2nd black packet and found a red plastic bag containing a package wrapped in tissue paper. He affixed a masking tape onto that tissue paper. He and SP9 put their signatures on both the red plastic bag and masking tape on that tissue paper. He removed that red plastic bag and tissue paper, and found a clear plastic packet containing a powdery substance. He made the markings ("X2", investigation number, and date 16 September 2003) on that 2nd clear plastic packet. He, SP2 and SP9 put their signatures on that 2nd clear plastic packet. He weighed and found that the gross weight of "X2" was 107.5 grams. He, SP2 and SP9 put their signatures on the masking tape on the carbon paper of the 3rd packet. He removed that carbon paper of that 3rd black packet and found a red plastic bag which he also removed and then found a clear plastic packet containing a powdery substance. He made the markings ("X3", investigation number, and date 16 September 2003) on the 3rd clear plastic packet. He and SP9 put their signatures on that 3rd clear plastic packet. He weighed and found that the gross weight of "X3" was 104.7 grams. That was all done in the presence of the accused. At 12.30 on 17 September 2003, he handed the drug exhibits to a government chemist (SP3 – Shadiah bte Mohammad) for analysis.

[7] It was the unchallenged testimony of the said government chemist that the packet marked "X1" contained 66.48 grams of methamphetamine, that the packet marked "X2" contained 69.54 grams of methamphetamine, and that the packet marked "X3" contained 72.12 grams of methamphetamine.

[8] At the close of the prosecution case, Miss Navamani Arumugam for the accused submitted that there was no conclusive proof to link the accused to the drugs. Learned counsel also submitted as follows. At the point when he was brought to examination room, there was no evidence that the accused had drugs. SP2 left the examination room without seeing the accused emptying his pockets. It was not proved that the packets came from the accused. The 3rd packet was recovered in the absence of the accused. How sure were SP2 and or SP6 that the examination room was empty? The drugs could have been there all along. The best inference must be given to an accused (counsel cited *Tai Chai Keh v. PP* [1948] 1 LNS 122). None of the witnesses could say which packets were recovered from the floor beneath the table or which packet was recovered from the wooden cabinet. Since physical possession was not proved, there could not be any question of trafficking. As the 3rd packet was not recovered in the presence of the accused, defence could not be called for all three packets. As it was not proved which two were those packets, defence could not be called for the two packets on the floor. There was no evidence that the trousers zip area of the accused was flat after his arrest. There was no evidence of trafficking. The accused was leaving Malaysia, and trafficking could not have been the intention. In the trial of a capital offence, mere suspicion is not enough (counsel cited *Choo Chang Teik & Anor v. PP* [1991] 3 CLJ 2387; [1991] 1 CLJ (Rep) 54).

[9] The learned DPP, Puan Amirah bte Mohd Yusoff, readily conceded that there was no evidence as to which two packets were those on the floor and which packet was that from the wooden cabinet. The learned DPP nevertheless contended that all three packets must have come from the accused. The learned DPP pointed to the evidence that the accused was "terkejut dan gelisah" when SP2 examined the suspicious bulge, that save for a table, three chairs, wooden and steel cabinets, the examination was empty, and that the packets were not there before the accused was brought into the examination room. They could not have dropped from the sky. The learned DPP also contended that the similarity in appearance, weight, size, and wrappings of all three packets was no coincidence. Then citing *Jayaraman Velayuthan & Ors v. PP* [1982] CLJ 464; [1982] CLJ (Rep) 130, the learned DPP submitted that "there could only be the one inference, that all three packets came

from the accused". "Section 37(da) should be invoked". The learned DPP added that there was direct evidence of trafficking even if s. 37(da) were not invoked.

[10] Section 180(1) of the Criminal Procedure Code (Code) provides that "when the case for the prosecution is concluded, the court shall consider whether the prosecution has made out a *prima facie* case against the accused". Given that the alleged offence was committed in 2003, the definition of a *prima facie* case in s. 180(4) of the Code which came into effect on 7 September 2007 "cannot apply retrospectively" (*PP v. Hanif Basree bin Abdul Rahman* [2008] 4 CLJ 1 per Zaki Azmi PCA) in the instant case. Rather, the definition to apply was that judicially pronounced in *Balachandran v. PP* [2005] 1 CLJ 85, where it was held by the Federal Court per Augustine Paul JCA, as he then was, that a *prima facie* case is one that it is sufficient for the accused to be called upon to answer where the evidence adduced is such that if unrebutted is sufficient to induce the court to believe in the existence of the facts stated in the charge or to consider its existence so probable that a prudent man ought to act upon the supposition that those facts exist or did happen, that a *prima facie* case has not been made out where there is no material evidence which can be believed in the latter sense, that the court must, at the close of the case for the prosecution, undertake a positive evaluation of the credibility and reliability of all the evidence adduced so as to determine whether the elements of the offence have been established, that the test at the close of the prosecution case is whether the evidence is sufficient to convict the accused if he elects to remain silent, and that an accused who elects to remain silent must be convicted.

[11] The first thing that could be said about the prosecution case is that it was built entirely on circumstantial evidence, which was that when first examined the accused had a suspicious bulge on the front of his trousers, that SP2 felt something concealed below the front waistline of the accused, that the examination room, save for some basic furniture, was devoid of all articles or objects before the accused was brought into that room, and that the three packets of proscribed drugs surfaced in the examination room only after the accused had been into that room. Further circumstantial evidence that augmented the prosecution case was the reaction ("terkejut dan gelisah") of the accused when SP2 felt the suspicious bulge with his fingers, the banging sounds from the wooden cabinet when the accused was all alone in the examination room, and the fact that the accused had changed his position, from being in front of the table to being in front of the wooden cabinet. Put together, the picture that the prosecution painted was that the accused had hastily relieved himself of the packets when SP2 was conveniently out of the

A examination room, by throwing two packets beneath the table and one packet into the wooden cabinet. If that were so, then that should account for the change in the position of the accused and the banging sounds heard from the wooden cabinet, as the accused would have to be close to the wooden cabinet and might even have to open it, to
B throw a packet into the wooden cabinet. All told, it would seem that there was sufficient evidence, *albeit* circumstantial, for a reasonable deduction that the accused must have had those three packets with him when he was brought into the examination room. In other words, the accused must have had possession of the three packets of proscribed
C drugs when he was brought into the examination room. If that were so, then the prosecution should be entitled to the benefit of s. 37(da) (see *PP v. Abdul Manaf bin Muhamad Hassan* [2006] 2 CLJ 129). For all three packets of proscribed drugs, it should seem that there was a *prima facie* case at first blush. But to find so would overlook the fact that the 3rd packet was recovered without the accused being present to witness
D the alleged recovery from the wooden cabinet. The importance of an accused being present to witness the recovery of proscribed drugs is this, that an accused who is not present during the recovery of the proscribed drugs would be effectively denied the chance to challenge the very evidence upon which his fate hangs, and would be thus seriously
E handicapped in the conduct of his defence. That could not be fair. More disturbing is this, that if proscribed drugs, *albeit* recovered without the presence of an accused, could be admitted in evidence, then there could be no safeguard against the possibility of proscribed drugs being planted after the arrest (for an analogy, see *Pang Chee Meng v. PP* [1992] 1 CLJ
F 39; [1992] 1 CLJ (Rep) 265). That would throw open the possibility of unjust convictions. Nope, the greater issue is the safeguard or some safeguard against false evidence, which would be breached if the 3rd packet were allowed to incriminate the accused. Simply put, the 3rd packet could not be in the equation.

G **[12]** Even so, there remained yet a *prima facie* case for the remaining two packets, which begs the question, which two packets. That was not answered by the evidence, as SP2 and or SP6 had not made any individual marks on any one of the three packets, or identified the packets there were recovered from the floor and or from the wooden
H cabinet. And that presented a most serious problem. The weight of the proscribed drugs must be stated in the amended charge, if the accused were to be called to enter upon his defence. But that weight could not be ascertained from the evidence. It is granted that the weight of those two packets must be the combined weight of two of those three packets,
I in any combination of two, would exceed the minimum tariff attracting the presumption under s. 37(da). But that deduction would still leave

unresolved the precise weight of those two packets. The weight of the proscribed drugs, just could not be stated in the (amended) charge. On top of that, there was yet the more crucial but unresolved issue of the identity of those two packets recovered from the floor. There was no way of knowing which two packets, X1, X2, and or X3, should be the proscribed drugs and the incriminating evidence, in the event that the accused were to be called to enter upon his defence. In the face of those uncertainties, and bearing in mind that it is the duty of the prosecution to prove each and every ingredient of the offence, it surely would not seem just or right to call the accused to enter upon his defence. In a cleft stick, there was really no other alternative but to acquit and discharge the accused.

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